

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-SAJ
	)	
TYSON FOODS, INC., et al	)	
	)	
Defendants	)	

**DEFENDANTS' RESPONSE TO PLAINTIFF'S**  
**MOTION TO EXCLUDE TESTIMONY OF DRs.**  
**SULLIVAN, MYODA, AND SAMADPOUR**

In response to the State's Motion In Limine to Exclude Testimony of Defendants' Expert Witnesses Drs. Sullican, Myoda and Samadpour, Simmons Foods, Inc. submits the following on behalf of all of the Defendants. Plaintiff's motion should be denied because Defendants fully complied with the Court's scheduling order.

1. On Friday, February 8, 2008, the Defendants submitted all their experts' opinions to Plaintiff's counsel pursuant to the Court's order. Beginning at 12:53 p.m. and continuing throughout the day, John Elrod sent the experts' opinions via email transmittal to Plaintiff's attorney Richard Garren. There were a total of 16 separate expert opinions, which were sent individually to Mr. Garren.
2. All of those emails were delivered without any "bounce back" message from Mr. Garren's computer. Mr. Elrod then sent these messages to all defense counsel, who also received them. One counsel's computer

initially rejected one of the 16 emails, but it issued a “bounce back” message in keeping with normal practice.

3. However, Mr. Garren now claims he did not receive 2 of the 17 emails. Copies of the emails are attached as Exhibit 1. He claims he did not receive the first email, which is the one that contained the expert report of Dr. Sullivan. And, he claims he did not receive the 14<sup>th</sup> email, which is the one that contained the combined expert report of Drs. Myoda and Samadpour. Coincidentally, these emails contain the affidavits of two key witnesses for the Defendants, whom Mr. Garren now seeks to exclude entirely.
4. Mr. Elrod’s computer servers report that all of the emails, including the two Mr. Garren claims not to have received, were sent to Mr. Garren’s correct email address (the same address where all of the other emails were delivered) and no bounce-back notification was received. Attached as Exhibit 2 are the computer records from Conner & Winters’ server that prove that the emails were sent from Conner & Winters to Richard Garren. In addition to the server records for the Sullivan and Myoda-Samadpour expert opinion emails, also attached are the server records for the Dunford and Huber Declarations. The server records demonstrate that Conner & Winters’ server handled the two emails Garren claims not to have received in exactly the same manner as the emails of Dunford and Huber materials, which Garren admits he received. The server records demonstrate that Conner &

Winters' server handled all 16 emails in exactly the same manner. These server records and copies of the emails were also provided to Plaintiff's counsel prior to Plaintiff filing its motion to exclude Sullivan, Myoda, and Samadpour.

5. On Tuesday, February 12, 2008, during a conversation between defense counsel and Mr. Garren, Mr. Garren stated that he had not received the 2 emails containing the expert disclosures at issue. Defense counsel sent the expert disclosures to Garren again by email and also sent hard copies to Garren overnight via Federal Express.
6. Defendants' transmission of the expert opinions via email was neither improper nor unusual. Throughout the 2 ½ years the parties have been involved in this case, counsel for Plaintiff and the Defendants have routinely exchanged information and documents by email. In fact, over the past few days Plaintiff's counsel served its demonstrative exhibits and lists of witnesses to Defendants via email transmission. Some of those emails are attached hereto as Exhibit 3. Contrary to Plaintiffs' suggestion, Plaintiff's counsel have never called Defendants when serving documents via email to make sure all the emails were received. Nor have Plaintiff's counsel ever sent an inventory to Defendants so that the emails could be compared to the inventory list to ensure that everything was received.
7. All of the evidence demonstrates that the 2 emails of Defendants' key witnesses were delivered along with the other 14 that were sent to Mr.

Garren's same email address on the same day. But even if there had been some delay in cyberspace after Defendants' timely production, the delay is harmless. Plaintiff's counsel have had copies of these affidavits for more than a week. The experts at issue will not testify until March 4, 5 or 6, 2008. By that time, Plaintiff will have had three weeks to prepare for the testimony, which is longer than the time for the defense experts who will testify at the end of this week.

In summary, Defendants provided the expert opinions to Plaintiff in accordance with the Court's order. If Plaintiff's counsel did not receive the emails it was due to an issue with Plaintiff's counsel's computer system. Defendants should not be penalized because of an apparent issue with Plaintiff's counsel's computer.

Simmons Foods, Inc.

/s/Vicki Bronson

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### **CERTIFICATE OF SERVICE**

On this 20<sup>th</sup> day of February, 2008, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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/s/ Vicki Bronson

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